

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9

10 BREND A J. HECK,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
14 Commissioner of the Social Security
Administration,
15

16 Defendant.

CASE NO. 2:16-cv-01669 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17
18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
19 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
20 Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States
21 Magistrate Judge, Dkt. 4). This matter has been fully briefed. *See* Dkt. 12, 13, 14.

22 Plaintiff was in a motorcycle accident in 2008. Despite suffering from various
23 impairments and symptoms as a result of this accident, plaintiff nevertheless was able to
24

1 maintain full time gainful employment from 2008 through mid-2013. However, plaintiff
2 alleges that her conditions worsened over time, in part based on an additional subsequent
3 motor vehicle accident. The ALJ relied heavily on a finding that the objective evidence
4 did not demonstrate any worsening in plaintiff's limitations. However, when making this
5 finding, the ALJ failed to acknowledge significant probative evidence of a 2013 opinion
6 from a treating physician regarding plaintiff's specific work-related limitations.

7
8 Defendant concedes that the ALJ erred by failing to discuss this significant
9 probative evidence, but contends that the error is harmless. Although defendant offers an
10 alternative rationale that the ALJ could have relied on when failing to credit fully this
11 2013 opinion from the treating physician, the Court is obliged to consider only the actual
12 findings offered by the ALJ. Furthermore, contrary to defendant's argument, the 2013
13 opinion is not "virtually identical" to the subsequent 2014 opinion addressed by the ALJ.
14 Even if the ALJ would have relied on her findings related to the 2014 opinion, such
15 reliance would not be based on substantial evidence in the record as a whole.

16 Therefore, the Court concludes that this matter must be reversed and remanded
17 pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further
18 administrative proceedings consistent with this order.

19 BACKGROUND

20 Plaintiff, BRENDA J. HECK, was born in 1963 and was 49 years old on the
21 alleged date of disability onset of June 20, 2013. *See* AR. 251-58. Plaintiff has work
22 experience as a secretary. AR. 54-57. Plaintiff's last employment ended when she was
23 unable to perform her job duties. AR. 79.
24

1 According to the ALJ, plaintiff has at least the severe impairments of
2 “degenerative disk disease of the lumbar and cervical spine, left upper extremity
3 arthropathy, migraine headaches, pain disorder with both psychological factors and
4 medical conditions, cognitive disorder not otherwise specified (NOS), affective disorder
5 NOS and anxiety disorder NOS (20 CFR 404.1520(c)).” AR. 24.

6 At the time of the hearing, plaintiff was living with her husband in their home.
7 AR. 89-91.

8 PROCEDURAL HISTORY

9
10 Plaintiff’s application for disability insurance benefits (“DIB”) pursuant to 42
11 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
12 reconsideration. *See* AR. 120, 134. Plaintiff’s requested hearing was held before
13 Administrative Law Judge Laura Valente (“the ALJ”) on February 17, 2015. *See* AR. 47-
14 119. On May 28, 2015, the ALJ issued a written decision in which the ALJ concluded
15 that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 18-46.

16 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether the
17 ALJ properly evaluated the opinions of Carolyn Marquardt, MD; (2) Whether the ALJ
18 properly evaluated the opinions of Kristen Sherman, PhD; (3) Whether the ALJ properly
19 evaluated the opinions of Martha Glisky, PhD, and fully developed the record as to her
20 opinions; (4) Whether the ALJ properly evaluated the opinion of H.L. Rappaport, MD;
21 (5) Whether the ALJ properly evaluated the observations of Asako Konoike, Darlene
22 Jacintho, and Michael Nahum; (6) Whether the ALJ properly evaluated plaintiff’s ability
23
24

1 to perform past work; and (7) Whether the ALJ properly assessed plaintiff's credibility.
2 See Dkt. 12, p. 1.

3 STANDARD OF REVIEW

4 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
5 denial of social security benefits if the ALJ's findings are based on legal error or not
6 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
7 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
8 1999)).

9 DISCUSSION

10 (1) **Whether the ALJ properly evaluated the medical opinions of treating 11 physician, Dr. Carolyn Marquardt, M.D.**

12 Plaintiff contends that the ALJ erred when she addressed only a 2014 declaration
13 from treating physician, Dr. Marquardt, which expressly opined regarding plaintiff's self-
14 report, and failed to address the 2013 opinion, which was the physician's own opinion
15 regarding plaintiff's functional limitations. Defendant concedes error, but contends that
16 the error is harmless.

17 In March, 2013, a few months prior to plaintiff's alleged date of disability onset,
18 plaintiff's treating physician provided an opinion to plaintiff's employer regarding
19 plaintiff's work-related limitations. See AR. 775. The physician indicated that she had
20 been treating plaintiff since 2011, and noted plaintiff's "chronic and residual issues from
21 a motorcycle accident from 8/09/2008." *Id.* Dr. Marquardt also noted that plaintiff "was
22 subsequently reinjured by an additional motor vehicle accident on 12/01/2011, which has
23
24

1 significantly exacerbated her pre-existing condition, [] [] [] aggravat[ing] her cervical
2 spine in terms of a cervical strain and aggravation of underlying cervical degenerative
3 changes, increasing aggravation of her lumbar degenerative changes and also resulting in
4 a traumatic brain injury and PTSD that is being followed by Dr. Martha Glisky, Ph.D.”
5 *Id.* Dr. Marquardt indicated that she concurred with the recommendations from Dr.
6 Glisky regarding accommodations necessary due to plaintiff’s mild traumatic brain injury
7 and PTSD. *Id.*

8
9 In this letter, Dr. Marquardt also indicated that plaintiff required “specific
10 accommodations related to her musculoskeletal issues of her neck and back, [which] will
11 be permanent, as she has a permanent aggravation of underlying arthritis.” *Id.* Dr.
12 Marquardt also opined that plaintiff requires “optimal ergonomics, including her work
13 site set-up.” *Id.*

14 “A treating physician’s medical opinion as to the nature and severity of an
15 individual’s impairment must be given controlling weight if that opinion is well-
16 supported and not inconsistent with the other substantial evidence in the case record.”
17 *Edlund v. Massanari*, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App. LEXIS 17960 at
18 *14 (9th Cir. 2001) (citing SSR 96-2p, 1996 SSR LEXIS 9); *see also Smolen v. Chater*,
19 80 F.3d 1273, 1285 (9th Cir. 1996). When the decision is unfavorable, it must “contain
20 specific reasons for the weight given to the treating source’s medical opinion, supported
21 by the evidence in the case record, and must be sufficiently specific to make clear to any
22 subsequent reviewers the weight the adjudicator gave to the [] opinion and the reasons for
23 that weight.” SSR 96-2p, 1996 SSR LEXIS 9 at *11-*12. Furthermore, even when an
24

1 opinion from a treating doctor is contradicted by other medical opinions, the opinion can
2 be rejected only “for specific and legitimate reasons that are supported by substantial
3 evidence in the record.” *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (citations
4 omitted).

5 The ALJ failed to take note of or discuss this particular opinion from plaintiff’s
6 treating physician. Defendant acknowledges the error, but argues that the error is
7 harmless because this 2013 letter is “virtually identical in limitations” to the 2014
8 declaration from Dr. Marquardt that the ALJ did discuss. *See* Dkt. 13, p. 12. However,
9 the ALJ offered no such finding regarding the identical nature of the two opinions, and,
10 according to the Ninth Circuit, “[l]ong-standing principles of administrative law require
11 us to review the ALJ’s decision based on the reasoning and actual findings offered by the
12 ALJ - - not *post hoc* rationalizations that attempt to intuit what the adjudicator may have
13 been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (citing
14 *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)); *see also*
15 *Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we may not uphold an agency’s
16 decision on a ground not actually relied on by the agency”) (citing *Chenery Corp, supra*,
17 332 U.S. at 196). Furthermore, the Court concludes that any such finding would not be
18 based on substantial evidence in the record as a whole. As noted by plaintiff, the 2014
19 “declaration does not discuss [plaintiff’s] need for ergonomic accommodations.” Dkt. 12,
20 p. 5 (citing AR. 816-17). Furthermore, also as noted by plaintiff, “the declaration does
21 not reference the accommodations recommended by Dr. Glisky, which Dr. Marquardt
22 endorsed.” *Id.* (citing AR. 775, 816-17).

1 In addition, the rationale relied on by the ALJ for her failure to credit fully the
2 2014 declaration from Dr. Marquardt is not necessarily applicable to Dr. Marquardt's
3 2013 opinion; therefore, it is unclear how the ALJ would have assessed the 2013 opinion.
4 In her written decision, the ALJ indicates that she failed to credit fully the 2014
5 declaration from Dr. Marquardt in part on the basis that it "was expressly based solely on
6 the claimant's subjective reporting of pain symptoms." AR. 34 (citation omitted). While
7 it is true that the 2014 declaration indicates an opinion regarding the supportability of
8 plaintiff's subjective reporting of pain symptoms, in contrast, there is no indication that
9 the 2013 letter is in regards to plaintiff's subjective reporting as opposed to being an
10 indication of Dr. Marquardt's own opinion. *See* AR. 775, 816-17.
11

12 The Court concludes that defendant's argument that the 2013 opinion from Dr.
13 Marquardt is "virtually identical" to the 2014 declaration from Dr. Marquardt is not
14 persuasive. The Court also concludes that the rationale relied on in part by the ALJ for
15 the failure to credit fully Dr. Marquardt's 2014 declaration is not applicable to Dr.
16 Marquardt's 2013 letter. Therefore, for the reasons stated and based on the record as a
17 whole, the Court agrees with defendant's implicit concession that the ALJ erred when
18 failing to discuss the 2013 opinion from Dr. Marquardt. As this 2013 opinion contains
19 significant work-related limitations, it is significant probative evidence that the ALJ erred
20 in failing to discuss. *See Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting
21 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)) (the "ALJ's written decision
22 must state reasons for disregarding significant probative evidence").
23
24

1 The Court also concludes that the error is not harmless. The Ninth Circuit has
2 “recognized that harmless error principles apply in the Social Security Act context.”
3 *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v. Commissioner*,
4 *Social Security Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting cases)).
5 Recently the Ninth Circuit reaffirmed the explanation in *Stout* that “ALJ errors in social
6 security are harmless if they are ‘inconsequential to the ultimate nondisability
7 determination’ and that ‘a reviewing court cannot consider [an] error harmless unless it
8 can confidently conclude that no reasonable ALJ, when fully crediting the testimony,
9 could have reached a different disability determination.’” *Marsh v. Colvin*, 792 F.3d
10 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In *Marsh*, even though
11 “the district court gave persuasive reasons to determine harmlessness,” the Ninth Circuit
12 reversed and remanded for further administrative proceedings, noting that “the decision
13 on disability rests with the ALJ and the Commissioner of the Social Security
14 Administration in the first instance, not with a district court.” *Id.* (citing 20 C.F.R. §
15 404.1527(d)(1)-(3)).
16

17 Here, Dr. Marquardt provided specific opinions in the 2013 letter regarding
18 plaintiff’s functional limitations, including the need for an optimal ergonomic work set
19 up. This limitation is not included in the ALJ’s finding regarding plaintiff’s residual
20 functional capacity (“RFC”), on which the ALJ relied when concluding that plaintiff is
21 not disabled. The record does not reflect whether accommodating this need for an optimal
22 ergonomic work set up would affect the jobs she could perform or would render plaintiff
23 disabled. Therefore, the Court cannot conclude with confidence ““that no reasonable ALJ,
24

1 when fully crediting the [2013 opinion], could have reached a different disability
2 determination.” *Marsh*, 792 F.3d at 1173. Furthermore, the ALJ did not address the
3 opinion from Dr. Marquardt regarding agreement with the limitations opined from Dr.
4 Glisky. It is unclear what effect this corroboration would have on the ALJ’s assessment
5 of Dr. Gisky’s opinion.

6 Because the error is not harmless, this matter must be reversed and remanded for
7 further administrative consideration. The Court agrees with plaintiff’s request for a *de*
8 *novo* hearing on her claim, and agrees that the ALJ should evaluate this 2013 opinion
9 from plaintiff’s treating physician in the first instance.
10

11 **(2) Whether the ALJ properly evaluated the opinions of Kristen Sherman,**
12 **Ph.D.; the opinions of Martha Glisky, Ph.D.; the opinion of H.L. Rappaport,**
13 **M.D.; and, the observations of Asako Konoike, Darlene Jacintho, and**
14 **Michael Nahum.**

15 The Court already has concluded that the ALJ erred when evaluating aspects of
16 the medical evidence and that this matter should be reversed and remanded for further
17 administrative proceedings, *see supra*, section 1. For this reason and based on the record
18 as a whole, Court concludes that the ALJ should evaluate anew all the medical evidence
19 and the lay evidence following remand of this matter.

20 **(3) Whether the ALJ properly evaluated plaintiff’s ability to perform past**
21 **work; and, whether the ALJ properly assessed plaintiff’s credibility.**

22 Similarly, as a necessity, plaintiff’s ability to perform past work needs to be
23 evaluated anew following remand of this matter. As the evaluation of a claimant’s
24 statements regarding limitations relies in part on the assessment of the medical evidence,

1 plaintiff's testimony and statements also should be assessed anew following remand of
2 this matter. *See* 20 C.F.R. § 404.1529(c); SSR 16-3p, 2016 SSR LEXIS 4.

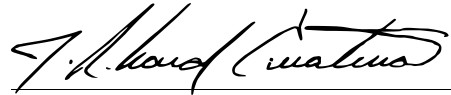
3 CONCLUSION

4 The ALJ erred by failing to discuss in the first instance significant probative
5 evidence from a treating physician regarding plaintiff's functional limitations.

6 Based on this reason, the stated rationale and the relevant record, the Court
7 **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four
8 of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent
9 with this order.
10

11 **JUDGMENT** should be for plaintiff and the case should be closed.

12 Dated this 3rd day of August, 2017.

13 

14 J. Richard Creatura
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24